

HONORABLE BENJAMIN H. SETTLE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ROBERT KELLY, ERYN LEARNED, AND
KERRY WANO, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

THE MCCLATCHY COMPANY, LLC, a
Delaware corporation,

Defendant.

Civil Action No. 3:21-cv-05468-BHS-
DWC

**DEFENDANT’S MOTION TO
TRANSFER VENUE**

NOTE ON MOTION CALENDAR:
September 17, 2021

ORAL ARGUMENT REQUESTED

Pursuant to 28 U.S.C. § 1404(a), Defendant The McClatchy Company, LLC (“McClatchy”) respectfully requests the Court transfer the above-entitled action to the United States District Court for the Eastern District of California in accordance with the forum-selection clause in the Terms of Service that Plaintiffs Robert Kelly, Eryn Learned, and Kerry Wano agreed to be bound by when they subscribed to a McClatchy newspaper (“Plaintiffs”).

FACTUAL BACKGROUND

McClatchy owns and operates newspapers throughout the United States, including but not limited to The Olympian, The Idaho Statesman, and The Kansas City Star. *See* Declaration of Maria Ravera (hereinafter “Ravera Decl.”) ¶ 2; ECF No. 1 ¶¶ 42, 54, 69. Individuals who subscribe to a newspaper owned by McClatchy agree to be bound to “Terms of Service”—whether by electronically signing the Terms of Service, agreeing to be bound to them via telephone, or by responding to a direct mailing—and further confirm agreement to be bound by them by paying

1 their subscription fees. *See* Ravera Decl. ¶ 3. These Terms of Service are identical for each
 2 newspaper, except for the information specific to the newspaper. *See id.*

3 When an individual subscribes in person, this agreement to be bound to the Terms of
 4 Service is confirmed by the subscribing individual electronically checking an unchecked check
 5 box immediately adjacent to the following statement:

6 I have read and agree to the Terms of Service. Our content is delivered to you by
 7 various methods and formats. For your convenience, your subscription will
 8 automatically renew after the initial term at the current rate unless you tell us to
 9 cancel. We reserve the right to substitute the delivery and format of your print
 10 subscription with only an eEdition (digital replica of a print edition) at any time.
 11 Notice of delivery and format changes, except those caused by inclement weather,
 will be given at least 30 days in advance.

12 *See* Ravera Decl. Ex. 1 at 2. The Terms of Service are linked to this disclosure and the check box
 13 must be checked in order for the individual to complete the subscription transaction. *See* Ravera
 14 Decl. ¶ 4.

15 For those who subscribe via telephone, the Terms of Service are read to them prior to
 16 completing the subscription. *See id.* ¶ 5. For those who subscribe via direct mailing, a printed link
 17 to the Terms of Service is included within the disclosures. *See id.* ¶ 6. A link to the Terms of
 18 Service is also present in each renewal bill, whether provided via hard copy or electronically. *See*
 19 Ravera Decl. Ex. 2 at 2.

20 Each of the Plaintiffs in this case has alleged that they subscribed to a McClatchy
 21 newspaper through one of the various available means, tacitly admitting that they agreed to be
 22 bound by McClatchy's Terms of Service and the arbitration provision therein. *See* ECF No. 1 ¶¶
 23 42, 54, 69. Material to Plaintiffs' Complaint, since 2015, McClatchy's Terms of Service have
 24 included the following arbitration provision, with the newspaper specific information auto-filled
 25 into the form Terms of Service:

26 **10.3. Dispute Resolution and Arbitration**

27 You and [PAPER_NAME] agree to the following dispute resolution process for

1 any legal controversy or legal claim arising out of or relating to these Terms of
 2 Service, [SITE_NAME], any subscription to [PAPER_NAME] or [SITE_NAME]
 or any other aspect of our relationship (“Subject Legal Claim”).

3 In an attempt to find the quickest and most efficient resolution of our issues, you
 4 and [PAPER_NAME] agree to first discuss any issue informally for at least 30
 5 days. To do that, please send your full name and contact information, your concern
 and your proposed solution by email to us at: customerservice@mcclatchy.com. If
 6 we should need to discuss an issue with you, we will contact you using the email
 or mailing address on your account.

7 If we do not reach an agreed upon solution after our discussions for at least 30 days,
 8 you and [PAPER_NAME] agree that any Subject Legal Claim that either of us may
 9 have must be resolved through binding individual arbitration before the American
 Arbitration Association using its Consumer Arbitration Rules. There are two
 10 limited exceptions to this Dispute Resolution and Arbitration provision: (i) either
 party may pursue in small claims court any action that is within that court’s
 11 jurisdiction, as long as the case proceeds on an individual basis only; (ii) either
 party may seek to enforce its patents, trademarks, copyrights or trade secrets in an
 12 appropriate state or federal court.

13 To help resolve any issues between us promptly and directly, you and
 [PAPER_NAME] agree to begin any arbitration within one year after a Subject
 14 Legal Claim arises; otherwise, the Subject Legal Claim is waived. You and
 [PAPER_NAME] also agree to arbitrate in each of our individual capacities only,
 15 not as a representative or member of a class, and each of us expressly waives any
 right to file a class action or seek relief on a class basis. All arbitration hearings
 16 will be held in Sacramento, California. The parties agree that this Dispute
 Resolution and Arbitration provision is subject to, and will be governed and
 17 enforced under, the Federal Arbitration Act.

18 You may download a form Notice to initiate arbitration at www.adr.org. If you
 19 initiate the arbitration, your arbitration fees will be limited to the filing fee set forth
 in the AAA’s Consumer Rules. It is important that you understand that the
 20 arbitrator’s decision will be binding and may be entered as a judgment in any court
 of competent jurisdiction. If the arbitrator rules against [PAPER_NAME], in
 21 addition to accepting whatever responsibility is ordered by the arbitrator, we think
 it’s fair that [PAPER_NAME] reimburse your reasonable attorneys’ fees and costs,
 22 regardless of who initiated the arbitration. In addition, if the arbitrator rules in
 [PAPER_NAME]’s favor, it will not seek reimbursement of our attorney’s fees,
 23 regardless of who initiated the arbitration.

24
 25 Ravera Decl. Ex. 3 at 9–10.¹

26
 27 ¹ Although there have been minor modifications to the Terms of Service since 2015, the arbitration
 clause has remained the same. Ravera Decl. ¶ 10. A copy of the current Terms of Service for each

1 The American Arbitration Association (AAA)'s Consumer Arbitration Rules cited in the
 2 Terms of Service are available to the public free of charge and easily locatable at
 3 <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>.

4 AAA's Consumer Arbitration Rules include the following provision:

5 Jurisdiction

6 (a) The arbitrator shall have the power to rule on his or her own jurisdiction,
 7 including any objections with respect to the existence, scope, or validity of the
 arbitration agreement or to the arbitrability of any claim or counterclaim.

8 (b) The arbitrator shall have the power to determine the existence or validity of a
 9 contract of which an arbitration clause forms a part. Such an arbitration clause shall
 10 be treated as an agreement independent of the other terms of the contract. A
 11 decision by the arbitrator that the contract is null and void shall not for that reason
 alone render invalid the arbitration clause.

12 Request for Judicial Notice ("RJN") Ex. 1 at 17. The current Consumer Arbitration Rules became
 13 effective September 1, 2014, *id.* at 1, and, therefore, are the applicable Consumer Arbitration Rules
 14 for Plaintiffs' claims.

15 On June 29, 2021, notwithstanding that Plaintiffs agreed that all Subject Legal Claims are
 16 governed by the Terms of Service's arbitration provision, which includes a one-year limitations
 17 period, Sacramento, California as the chosen venue, and a class action waiver, Plaintiffs filed a
 18 Complaint in the Western District of Washington including claims that are time barred on behalf
 19 of a nationwide class of individuals. ECF No. 1.

20 **LEGAL STANDARD**

21 "For the convenience of parties and witnesses, in the interest of justice, a district court may
 22 transfer any civil action to any other district or division where it might have been brought or to
 23 any district or division to which all parties have consented." 28 U.S.C. § 1404(a). Where such
 24 transfer is made to enforce a contractual forum-selection clause, "a district court should ordinarily
 25 transfer the case to the forum specified in that clause. Only under extraordinary circumstances
 26

27 of the at-issue newspapers are appended to Ms. Ravera's declaration. *See* Ravera Decl. Exs. 4–6.

unrelated to the convenience of the parties should a § 1404(a) motion be denied.” *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 62 (2013).

When a forum-selection clause forms the basis for a Section 1404(a) motion, the standard analysis is modified in three ways: (1) a plaintiff forfeits his or her choice of forum privilege and “bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted,” (2) a court “should not consider arguments about the parties’ private interests . . . [but] may consider arguments about public-interest factors only,” and (3) “transfer of venue will not carry with it the original venue’s choice-of-law rules.” *Id.* at 63–65.

ARGUMENT

The Terms of Service expressly require that that all “Subject Legal Claim[s],” defined as “any legal controversy or legal claim arising out of or relating to these Terms of Service, [SITE_NAME], any subscription to [PAPER_NAME] or [SITE_NAME] or any other aspect of our relationship,” be resolved on an individual basis in an AAA arbitral forum in Sacramento, California. *See* Ravera Decl. Ex. 3 at 9. However, since the rule in the Ninth Circuit appears to be that a court may only compel arbitration within its jurisdiction, the proper procedure appears to be to transfer this case to the Eastern District of California, where McClatchy may then file its motion to compel arbitration, and the Eastern District of California will retain jurisdiction to enforce any arbitral ruling. Transfer to the Eastern District of California is appropriate because Sacramento, California is located within that District.

A. Arbitration in Sacramento is the Proper Forum to Resolve Plaintiffs’ Claims

Regardless of what substantive law applies, “both state and federal law strongly favor arbitration and require all presumptions to be made in favor of arbitration.” *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) (citing *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004)); *see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”). “Courts must

1 indulge every presumption ‘in favor of arbitration, whether the problem at hand is the construction
 2 of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.’”
 3 *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342 (2004) (citing *Moses*, 460 U.S. at 25).²

4 Here, the parties expressly agreed to four routes by which Subject Legal Claims would be
 5 resolved: (1) informally, (2) on an individual basis through AAA arbitration in Sacramento,
 6 California; (3) in a small claims court; or (4) in state or federal court for intellectual property
 7 claims. Ravera Decl. Ex. 3 at 9. Plaintiffs have filed a formal complaint but are not alleging any
 8 intellectual property claims and have not brought individual claims in a small claims court.
 9 Therefore, the only remaining agreed-upon option is to resolve any Subject Legal Claim on an
 10 individual basis through AAA binding arbitration in Sacramento, California.

11 **B. Transfer is Necessary As This Court Likely Does Not Have Jurisdiction to Compel**
 12 **Arbitration in Sacramento, California**

13 Although 9 U.S.C. § 4 authorizes federal courts to compel arbitration, courts in the Ninth
 14 Circuit implementing the statute have held that such authority is limited to compelling arbitration
 15 within a court’s jurisdiction. *See, e.g., Guo v. Kyani, Inc.* No. LA CV17–08257 JAK (GJSx), 2018
 16 U.S. Dist. LEXIS 227744, at *14 (C.D. Cal. July 20, 2018) (“[I]n the Ninth Circuit, a district court
 17 may not compel arbitration in a district other than the district in which the motion or petition to
 18 compel was filed.” (citing *Lexington Ins. Co. v. Centex Homes*, 795 F. Supp. 2d 1084, 1091 (D.
 19 Haw. 2011))).³ Consequently, once the Court transfers this matter to the Eastern District of
 20 _____

21 ² Although the issue of enforceability of the Terms of Service is not directly before this Court, the
 22 parties have expressly delegated the determination of enforceability to the arbitrator by
 23 incorporating the AAA Consumer Arbitration Rules. *See Brennan v. Opus Bank*, 796 F.3d 1125,
 24 1130 (9th Cir. 2015) (“[G]ateway issues [of arbitrability] can be expressly delegated to the
 25 arbitrator where ‘the parties clearly and unmistakably’ [do so.]” (quoting *AT&T Techs., Inc. v.*
 26 *Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986))); *Brennan*, 796 F.3d at 1130 (“Now that
 the question regarding incorporation of the AAA rules is squarely before us, we hold that
 incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting
 parties agreed to arbitrate arbitrability.”); Ravera Decl. Ex. 3 at 9–10.

27 ³ The Ninth Circuit has not directly addressed the question as to whether a defendant can move to
 compel arbitration outside of a district court’s jurisdiction. *See Cont’l Grain Co. v. Dant & Russell,*
Inc., 118 F.2d 967, 969 (9th Cir. 1941) (affirming District Court of Oregon’s order to compel

1 California, McClatchy will exercise its contractual right to move to compel arbitration in
 2 Sacramento, as agreed to by the parties in the Terms of Service.

3 The majority of the factors a court considers in deciding a motion to transfer further weigh
 4 in favor of a transfer of this Action. As noted above, analysis of motions to transfer based on
 5 enforcing a valid forum–selection clause does not give weight to a plaintiff’s selection of forum
 6 or consider the private interests of the parties. *Atl. Marine*, 571 U.S. at 63–64. Thus, the only
 7 factors left to consider are the public–interest considerations, *i.e.*, “administrative difficulties
 8 flowing from court congestion; the ‘local interest in having localized controversies decided at
 9 home’; . . . the avoidance of unnecessary problems in conflict of laws . . . ; and the unfairness of
 10 burdening citizens in an unrelated forum with jury duty.” *Piper Aircraft Co. v. Reyno*, 454 U.S.
 11 235, 241 n.6 (1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)). Here, there is
 12 no “local interest” because the Complaint alleges claims on behalf of a nationwide putative class
 13

14 arbitration in Oregon despite arbitration clause identifying New York because the plaintiff,
 15 “having invoked the jurisdiction of the United States District Court for Oregon is hardly in a
 16 position to complain that it has exercised that jurisdiction in accordance with the statute giving it
 17 jurisdiction”); *Textile Unlimited v. A.bmhand Co.*, 240 F.3d 781, 785 (9th Cir. 2001) (noting that
 18 Section 4 “confines the arbitration to the district in which the petition to compel is filed” but doing
 19 so in the context of a motion to enjoin pending arbitration). However, most district courts in the
 20 Ninth Circuit, while “sympathetic to Defendants’ argument that Plaintiffs should not be allowed
 21 to avoid the contractual place–of–arbitration clause simply by filing suit in another judicial
 22 district,” have interpreted the language of *Continental Grain* and *Textile Unlimited* to be “a broad
 23 statement that a court may not compel arbitration in another judicial district.” *Larson v. Speetjens*,
 24 No. C 05–3176 SBA, 2006 U.S. Dist. LEXIS 87481, at *7–8 (N.D. Cal. Nov. 17, 2006). *But see*
 25 *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1271 n.1 (9th Cir. 2002) (affirming Southern District
 26 of California court’s order compelling arbitration in Chicago because the plaintiff had waived the
 27 argument by not raising it in the opposition to the motion to compel). There is a circuit split as to
 whether courts can compel arbitration outside of their jurisdiction. *Compare Econo–Car Int’l v.*
Antilles Car Rentals, 499 F.2d 1391, 1394 (3d Cir. 1974) (“[Section 4’s] requirement that
 arbitration take place in the district court where the petition is filed is clear and unequivocal.”) *with*
Dupuy–Busching Gen. Agency, Inc. v. Ambassador Ins. Co., 524 F.2d 1275, 1278 (5th Cir. 1975)
 (“[W]here the party seeking to avoid arbitration brings a suit for injunctive relief in a district other
 than that in which arbitration is to take place under the contract, the party seeking arbitration may
 assert its Section 4 right to have the arbitration agreement performed in accordance with the terms
 of the agreement.”). Therefore, in an abundance of caution, McClatchy is requesting this Court
 transfer this action to the Eastern District of California.

1 that could have been brought in any federal court if the Terms of Service did not include a binding
 2 arbitration clause with a class action waiver. Also because the suit is a class action, keeping the
 3 case in the Western District of Washington will not ameliorate any conflict of law issues or the
 4 burden placed on a citizen to have jury duty for claims unrelated to this forum. Accordingly, these
 5 administrative considerations support transfer of the litigation to the Eastern District of California
 6 so that it can compel arbitration in an AAA forum, as agreed to by the parties.

7 Although the Eastern District of California has a slightly longer median resolution time
 8 than the Western District of Washington, the difference is a modest two months. *See* RJN Exs. B–
 9 C. Even so, Plaintiffs have waited to bring their Complaint, with claims allegedly arising in several
 10 instances more than a year ago. *See* ECF No. 1 ¶¶ 45, 62.

11 In light of the factors overall weighing in favor of transfer, and given the Supreme Court’s
 12 acknowledgement that “[b]ecause th[e] [public–interest] factors will rarely defeat a transfer
 13 motion, the practical result is that forum–selection clauses should control except in unusual cases,”
 14 *Atl. Marine*, 571 U.S. at 64, transferring this case to the Eastern District of California is proper.

15 CONCLUSION

16 The parties expressly agreed that the sole venue and forum for resolving disputes between
 17 them is binding AAA arbitration in Sacramento, California on an individual basis. As this Court
 18 may not be permitted to compel the parties to arbitrate their claims in Sacramento, California,
 19 McClatchy respectfully requests the Court transfer this case to the Eastern District of California,
 20 so that it can enforce the binding arbitration clause in the governing Terms of Service.

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1 DATED this 23rd day of August, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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14 THE MCCLATCHY COMPANY, LLC

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 23, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Signed at Seattle, Washington this 23rd day of August, 2021.

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